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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1962

No. **997**

ATLANTIC & GULF STEVEDORES, INC.,
a corporation,
Petitioner,

v.

AMERICAN EXPORT LINES, INC.,
a foreign corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND APPENDIX

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a corporation,
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v.

AMERICAN EXPORT LINES, INC.,
a foreign corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Atlantic & Gulf Stevedores, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on January 9, 1963.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court is reported in 205 F.Supp. 316 (E.D. Va. 1962), and is printed in Appendix A, hereto, *infra*. The opinion of the Circuit

Court of Appeals is unreported and is printed in Appendix B hereto *infra*.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 9, 1963, (R. 19), and is printed in Appendix C hereto, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

I. WHETHER IN A SUIT BY A LONGSHOREMAN AGAINST A SHIPOWNER FOR NEGLIGENCE AND UNSEAWORTHINESS, THE STEVEDORING COMPANY'S IMPLIED WARRANTY OF WORKMANLIKE SERVICE IMPOSES ON IT A DUTY TO ASSUME THE DEFENSE OF THE SHIPOWNER IN THE ORIGINAL ACTION, FAILING IN WHICH, THE STEVEDORE IS BOUND BY THE FINDINGS MADE THEREIN IN A SUBSEQUENT INDEMNITY ACTION ALTHOUGH NOT A PARTY TO THE ORIGINAL SUIT.

II. WHETHER THE STEVEDORING COMPANY IS ENTITLED TO A FINDING AS TO WHETHER THE SHIPOWNER WAS GUILTY OF CONDUCT SUFFICIENT TO PRECLUDE AN INDEMNITY RECOVERY WHERE THE DECISION OF THE DISTRICT COURT IN FAVOR OF THE STEVEDORING COMPANY ON OTHER GROUNDS WAS REVERSED ON APPEAL AND JUDGMENT ENTERED FOR THE SHIPOWNER.

STATEMENT

This is an action by a shipowner, American Export Lines, Inc., hereinafter called "Export", seeking indemnity from a stevedore, Atlantic & Gulf Stevedores, Inc., referred to as "Atlantic", for breach of a contract pertaining to stevedoring services.[1]

On September 26, 1956, during loading operations aboard the S.S. EXCELLOR, owned by American Export Lines, Inc., a draft of freight struck the coaming of the No. 5 hatch. Its contents spilled into the hold, seriously injuring Arthur Harper, a longshoreman employed by Atlantic & Gulf Stevedores, Inc., who was working below. After receiving compensation from his employer under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, *et seq.*, as amended, 33 U.S.C. § 901, *et seq.*, Harper brought an action against Export, alleging negligence of Export and unseaworthiness of the vessel.

On May 15, 1958, only 25 days prior to trial, Export invited Atlantic to defend Harper's action against Export. Atlantic declined this invitation, and since it had not been impleaded by Export, it was at no time a party to the original damage suit. Export's invitation to defend came approximately 21 months after the accident, 11[4] months after suit had been instituted by Harper, and many months after the trial date had been fixed at a pre-trial conference

[1] By written contract dated September 20, 1956, Atlantic agreed, among other things, to (1) provide all necessary stevedoring labor, including winch men, etc., foremen, and such other stevedoring supervision as were needed for the proper and efficient conduct of the work, (2) discharge cargo from or load cargo into vessels' holds, 'tween decks, etc., (3) work two gangs simultaneously in hatches when required if necessary equipment is available.

attended by Harper and Export. Export's investigation and pleadings clearly indicated that Export was not liable for negligence and that the vessel was not unseaworthy.

At the trial two versions of the accident were presented as to what caused the draft to strike the coaming. Some witnesses testified that the winches were defective, and that this condition was known to the stevedore personnel at least two and one-half hours before the accident, but the foreman of the gang of longshoremen ordered them to proceed with their work. There was other testimony, however, that the accident was caused solely by the failure of the winch operators to raise the draft to a sufficient height, thus permitting it to strike the coaming instead of passing above it. On this conflicting evidence, a jury rendered a general verdict against the vessel's owner in favor of Harper in the sum of $25,000.00. No special interrogatories were requested or submitted. Thereafter, on June 13, 1958, judgment was entered on the verdict, which judgment was subsequently paid by Export. With the addition of counsel fees and expenses, the total loss to Export amounted to $31,585.37.

Thereafter, on March 19, 1958, Export brought the present admiralty action against Atlantic in the United States District Court for Eastern District of Virginia, Norfolk Division, for reimbursement of the aforementioned loss, alleging in its Libel that it was entitled to be so indemnified since Atlantic had breached its implied contract to perform its stevedoring duties in a workmanlike manner. The jurisdiction of the District Court was invoked under 28 U.S.C. § 1333(1).

The trial of the case took place on June 5, 1961, at which time the evidence presented was substantially the same as

that adduced in the action between Harper and Export. On June 7, 1962, District Judge Hoffman filed his memorandum opinion, Appendix A, *infra*, denying a recovery to Export. In so deciding, the District Court determined that inasmuch as Atlantic was not a party to the original damage suit, the jury verdict in the first trial and the factual determinations necessary to such verdict were not binding upon it in the subsequent indemnity action, thereby enabling the Court to hear the matter *de novo*. The Final Decree was entered on June 21, 1962. Such Decree adopted the Court's memorandum opinion as its findings of fact and conclusions of law. From this memorandum opinion and Final Decree Export appealed to the Fourth Circuit Court of Appeals.

The Court below reversed and remanded with directions to enter judgment for Export. In so deciding, the Court below held that Export's liability as determined by a jury in the primary suit by the injured longshoreman precluded any further inquiry into that aspect of the case. The Court further stated that the shipowner was bound only to show that the stevedore's breach of warranty occasioned its expense and that absent conduct on the part of the shipowner sufficient to preclude recovery, the shipowner should be allowed indemnity over. No mention was made of the fact that Atlantic was not a party to the initial personal injury suit.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below in the instant case expressly holds only that upon proof of breach of the stevedore's implied warranty, the shipowner must be indemnified for any losses which foreseeably result from such breach.

In addition, however, the opinion, by clear inference, also holds that a stevedore has an absolute duty to defend a shipowner whenever such shipowner is sued by a longshoreman for personal injuries. It must be inferred from this ruling that the Court below is of the opinion that general indemnity rules do not apply in the stevedore contract area, for in *Farm Bureau Mut. Automobile Ins. Co. v. Hammer*, 177 F.2d 793 (4th Cir. 1949), *cert. denied*, 339 U.S. 914, 1950, the same court correctly stated that the law of indemnity does not impose a duty to defend on the indemnitor where his interests are not identical with those of the indemnitee. At p. 800 the Court, speaking through Judge Soper, stated that:

> "A third party cannot be called upon to defend an action where his showing himself not to be liable will not necessarily result in a judgment in favor of a party asking him to defend."

Atlantic submits that *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 76 S.Ct. 232 (1956), did no more than establish that there was an implied warranty of workmanlike service. Having decided that point, the rights of the shipowner and stevedore *inter se* are to be governed by general principles of indemnity law.

The indemnity relationship that exists between the stevedore and the shipowner is unique in the law. The relationship exists not as a result of a consentual contract between the parties, but rather by operation of law from the nature of the stevedore's work. *Ryan*, supra. It is clear that in this area of implied contractual indemnity, the interests of the shipowner and the stevedore are not identical, for a showing by the stevedore that the accident was caused solely by the

negligence of the shipowner or the unseaworthiness of the vessel would place the entire burden of the loss on the shipowner, and at the same time free itself from any claim for indemnity over. In *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438 (1958), this Court recognized such a diversity of interests. That the stevedore-indemnitor is not under an absolute duty to defend is also clearly indicated by the Third Circuit in the case of *Crawford v. Pope & Talbot, Inc.*, 206 F.2d 784 (3d Cir. 1953). Thus, a conflict with regard to this very important point of indemnity law exists among these two Circuit Courts.

Assuming, *arguendo*, that the Fourth Circuit is correct in its holding that there is an absolute duty to defend the shipowner in each and every longshoreman action, nevertheless, the stevedore must be given reasonable notice of the action and requested to defend. *Crawford*, supra; *Restatement of Judgments*, §§ 106, 107(a); *Restatement of Restitution*, § 76, *Comment f*, § 78, *Comment c*.

In that instant case, the notice given by Export to Atlantic was determined by the District Judge to be unreasonable. This finding of fact by the District Court was binding on the Court of Appeals unless clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6 (1954). Not only did the Court below fail to designate the grounds upon which it relied in apparently determining that this finding of the District Court was clearly erroneous, but it also apparently determined that notice must only be "advance" rather than reasonable. The Court below, in holding that Atlantic is under an absolute duty to defend Export in the personal injury action and that the notice of the suit given by Export was adequate although only "advance," there-

upon apparently concluded that the jury verdict and resulting judgment in the initial personal injury action are binding upon both the shipowner-indemnitee and the stevedore-indemnitor in the subsequent indemnity suit. This result is in conflict with the decision of the Third Circuit in *Crawford*, supra, where the Court said at p. 795:

> "We conclude that the answers to the questions posed above are as follows. If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action."

The decision of the Court below in the instant case also conflicts in principle with another decision of the Third Circuit, *Curtis v. A. Garcia Y Cia*, 272 F.2d 235 (3d Cir. 1959). In that case there was a general jury verdict against the shipowner, as in the instant case. In the subsequent indemnity action, the Court held that the failure of the jury to specify or clearly indicate what conduct of the shipowner constituted negligence prevented that judgment from providing any proper basis for a claim of *res judicata* as to the nature of the shipowner's negligence.

2. The questions here presented are widespread in their importance. The First, Second, Third, Fourth, Fifth, and Ninth Circuits are continually being presented with maritime suits in this area; and due to the nature of longshoremen work, this condition will continue to exist.

The current law in this area was fostered by this Court in *Ryan*, supra, and the rights of the parties affected by this law can properly be delineated only by this Court. As District Judge Hoffman stated at the conclusion of his memorandum opinion, Appendix A, *infra*:

> "In the confusing field of law relating to indemnity actions by shipowners against stevedores, a more authoritative clarification of the rights of the respective parties would be gratifying."

The stevedore currently carries the double burden of absolute liability under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, *et seq.*, as amended, 33 U.S.C. § 901, *et seq.*, and almost certain liability under the decisions following *Ryan*, supra. The stevedore is a valuable member of our shipping industry and should not be burdened still further with the uncertainty which the instant case creates.

The instant decision also puts the stevedore in an untenable and inequitable position. Either it must accept any request by the shipowner to defend, regardless of the merits of the case as reflected by pre-trial investigation, or refuse to defend the shipowner and run the risk of being bound in a subsequent indemnity action by the findings in the personal injury action to which it was not a party. And if the stevedore assumes the defense on behalf of the shipowner, he is put in the anomalous position as stated above of attempting to defend two conflicting and divergent interests.

Moreover, the rules of procedure, both on the civil side of the Court and in admiralty, provide for third-party

practice, with the intent of reducing needless litigation. *American Stevedores* v. *Porello*, 330 U.S. 446, 67 S.Ct. 847 (1947). No case has been found in this area in which the stevedore was not impleaded by the shipowner. If the instant case remains the law, the needless multiplicity of suits will be encouraged, for the shipowner will be able to suffer findings in the original damage suit which will then become binding on the stevedore in the subsequent indemnity action. Also, the shipowner can bring his subsequent indemnity suit in admiralty and avoid the uncertainties of a jury verdict on the issue of the stevedore's breach of warranty.

If the opinion of the Court below stands without further clarification, and if the conflict in principle between the Third Circuit and this Circuit is not resolved, then even greater confusion, additional needless litigation, and general uncertainty among the stevedoring and shipping industries will result.

The facts of the instant case require that either Export or Atlantic will be subject to an inequitable result. However, it should be quickly pointed out that this inequity has come about as solely because Export elected not to use the impleader procedure which has been so prevelent in the past. The question then becomes simply which of the two parties should bear the risk of an inconsistent finding in the second trial. As Atlantic had no procedure by which it could enter the original damage suit in its own name in order to protect its own interest, it is submitted that the onus of an inconsistent verdict in the second trial should rest on Export, who, for reasons of self-interest, refused to follow the standard and accepted procedure of impleading Atlantic.

3. In the instant case, the District Court, in rendering a verdict in favor of Atlantic, was not required to decide whether the negligence of Export which was found by the jury in the original damage suit was conduct sufficient to preclude an indemnity recovery. When the Fourth Circuit reversed the District Court and remanded with directions to enter judgment for Export, Atlantic was denied a finding by the trier of fact on the issue of whether Export had been guilty of such conduct. That this issue is for the trier of fact was determined by this Court in *Weyerhaeuser*, supra. This rule has been adhered to by the Third Circuit in *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional*, 294 F.2d 32 (3d Cir. 1961), *cert. denied*, 369 U.S. 848, 82 S.Ct. 931 (1961), and by the Second Circuit in *McNamara* v. *Weichsel Dampschifffahrts AG Kiel*, 293 F.2d 980 (2d Cir. 1961).

This Court, in *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, 396 U.S. 355, 82 S.Ct. 780 (1962), has emphasized the importance of a factual determination of all issues which would effect the conduct and mutual obligations of the stevedore and the shipowner in this field of contractual idemnity. In the instant case, Atlantic has been denied such a factual determination.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES DISTRICT COURT

Norfolk Division

Admiralty No. 8016.

AMERICAN EXPORT LINES, INC.,
a foreign corporation,
libellant,

v.

ATLANTIC & GULF STEVEDORES, INC.,
a corporation,
respondent.

MEMORANDUM

This is an action by a shipowner, American Export Lines, Inc., hereinafter called "Export", seeking indemnity from a stevedore, Atlantic & Gulf Stevedores, Inc., referred to as "Atlantic", for breach of a contract pertaining to stevedoring services.[1]

[1] By written contract dated September 20, 1956, Atlantic agreed, among other things, to (1) provide all necessary stevedoring labor, including winchmen, etc., foremen and such other stevedoring supervision as were needed for the proper and efficient conduct of the work, (2) discharge cargo from or load cargo into vessel's holds, 'tween decks, etc., (3) work two gangs simultaneously in hatches when required if necessary equipment is available. The court recognizes that there is also an implied contract to perform the stevedoring services in a safe and workmanlike manner.

The SS EXCELLER, owned and operated by Export was the subject of this stevedoring contract on September 30, 1956. A gang of longshoremen, of which Alton Mosley was hatch boss, was employed to load cartons of cheese into the forward end of No. 5 hatch of the vessel. John W. Shell was the burton winch operator for the gang. David W. Hardy operated the up-and-down winch. Daniel Johnson acted as signalman or gangwayman. Arthur Harper was a holdman.

The work of loading that hatch began at least by 8 A.M. on September 20. At about 10:50 A.M. on that date, a draft of cheese while being brought on board by the longshoremen struck the coaming of the hatch and some of the cartons fell into the hold, striking and causing serious injuries to Arthur Harper.

What caused the draft to strike the coaming is vigorously disputed. The longshoremen testified that both cargo winches at the forward end of the hatch were defective in that the magnetic brakes did not hold and allowed each draft to drift to a stop. They said the mechanical foot brakes were frozen. They said this condition was known to the winch operators, signalman, hatch boss, and stevedore foreman of Atlantic for at least 2½ hours before the accident; that the stevedore foreman said "keep on working" and they did so. They did this, they said, even though the brakes were not repaired before the accident, though a ship's mate had promised to send the electrician but did not do so. They testified that the fatal draft drifted into the coaming after they attempted to stop it over the deck in mid-air by applying the magnetic brakes.

The stevedore foreman, on the other hand, testified that no complaint was made to him about the winches, that the

work proceeded without incident until the accident and for the rest of the day thereafter. The present Norfolk manager of Atlantic, E. J. Adams, testified that he saw the accident, that the longshoremen swung the fatal draft over the deck and that they then moved it without stopping in the direction of and then into the hatch coaming, at which point it upset and cartons spilled into the hold, striking and injuring Arthur Harper. The manager's testimony clearly indicated that the longshoremen failed to raise the draft to sufficient height, thus permitting it to strike the coaming instead of passing above it.

The foregoing was substantially the testimony adduced at the trial in which Harper instituted a civil action against Export alleging negligence on the part of Export and unseaworthiness of the EXCELLER. Both issues were submitted to the jury under an appropriate charge. The jury returned a general verdict in favor of Harper in the sum of $25,000.00. No special interrogatories were requested or submitted. It should be noted that Atlantic was not a party to this action, either as an original or third-party defendant. Indeed, Atlantic could not have been sued by Harper due to the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

On June 28, 1957, Atlantic wrote Export asserting a lien for compensation benefits paid to Harper. Atlantic knew that Harper's action had then been filed. On May 15, 1958, only 25 days prior to trial, Export invited Atlantic to defend Harper's action against Export. Atlantic declined, stating in part, ". . . . there is nothing in our file to indicate that we should accept your invitation to defend American Export Lines, Inc. During the trial of Harper's action from June 10-13, 1958, counsel for Atlantic was

present as an observer. No effort was ever made by Export to join Atlantic as a third-party defendant. Subsequent to the entry of judgment Export, on June 24, 1958, requested Atlantic to pay the judgment or appeal. Atlantic promptly declined. On July 29, 1958, Export paid the judgment, interest and costs aggregating $25,371.72. Legal fees and expenses incurred by Export in the defense of Harper's action amount to $6,213.65. This indemnity action was thereafter instituted seeking the recovery of $31,585.37, plus interest at 6% per annum and the taxable court costs of the pending litigation.

The testimony at the indemnity trial was substantially identical to the original action; the essential difference being that the indemnity action is in admiralty with no jury, whereas Harper's case was on the civil side of the court and heard before a jury. Thus we have different triers of fact and, as frequently happens, there are contrary findings. The clear preponderance of the evidence is that the sole proximate cause of the accident was the negligence of Harper's co-employees, Shell and Hardy, in the operation of the winches. Nevertheless, there was evidence to go to the jury in the Harper case on the issues of negligence and unseaworthiness but, if the court had been the trier of fact, Harper would not have recovered against Export. The jury had been instructed in Harper's action that if the sole proximate cause of the accident was the negligence of Atlantic's employees, there should, of necessity, be a finding for the defendant, Export. The jury concluded that either Export was negligent or the vessel was unseaworthy, or both.

Export was at liberty to file a third-party complaint against Atlantic, as a third-party defendant, in the Harper

action. This, for reasons of its own, it did not do. If such a third-party complaint had been filed, Atlantic was then entitled to the benefit of a jury trial on the issue as to whether it had performed its stevedoring contract in a workmanlike manner and with reasonable safety. *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U. S. 563. In *Weyerhaeuser*, a third-party action, a jury had found for the longshoremen against the shipowner on the issue of negligence only. After receiving the verdict, the district court held that the verdict was dispositive of the third-party action and directed a verdict for the stevedore. The Supreme Court held that the issue of the stevedore's alleged failure to perform its contractual undertaking with reasonable safety constituted a jury question.

As pointed out in *Weyerhaeuser*, the issue as to the stevedore's breach of contract was not encompassed by the instructions in Harper's case against Export. The jury, in Harper, could have concluded that the winches were unseaworthy—an event for which the stevedore would not be liable unless such defect could have been ascertained by the stevedore in the exercise of reasonable inspection of the equipment. *Smith v. Jugoslavenska Linijska Plovidba*, 4 Cir. 278 F. (2d) 176, or unless the negligence of the stevedore brought the unseaworthiness of the vessel into play. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423. In the present case, the jury could have concluded that the magnetic brakes on the winches became defective at the moment of the accident. If so, the vessel would have been unseaworthy, but without any breach on the part of Atlantic. Unlike *Crumady*, where the ship furnished the stevedore with a boom rigged for three tons with its winch set by the ship's crew to cut off at at six tons, which was twice the rated limit of the rigging, the unseaworthiness of the

winches in the present case could have been occasioned by an instantaneous defect which, under *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539, would have imposed absolute liability upon Export. We do not suggest that the jury in Harper's action arrived at this finding; we only say that it is one possible conclusion reached.

In the recent case of *Atlantic & Gulf Stevedores*, v. *Ellerman Lines, Ltd.*, U.S. , 30 L. W. 4275, the Supreme Court held that a jury verdict for an injured longshoreman against the shipowner, in a federal diversity case, did not require the trial court to enter judgment over for the shipowner against the impleaded stevedore, unless the jury verdict implied a finding that each possible ground of shipowner's negligence involved a breach of the stevedore's duty as a matter of law. There, unlike the present issue, special interrogatories were submitted to the jury with findings of negligence and unseaworthiness on the part of the shipowner and the vessel, but with other findings that the stevedore did not breach its contractual obligations with the shipowner. While there is considerable discussion of the rights reserved to suitors as to a jury trial, by analogy the principles are similar.

We conclude, therefore, that the verdict and judgment in the *Harper* case—to which Atlantic was not a party—does not, as a matter of law, impose liability upon the stevedore in this indemnity action instituted in admiralty. As heretofore indicated this court, if it had been the trier of fact in Harper, would have determined that the sole proximate cause of the accident was the negligence of the stevedore's winch operators—negligence which Harper was precluded from asserting in his action and for which he could not have recovered.

The question of the finality of the results in Harper's action is admittedly a contraversial subject among legal experts. In *Crawford* v. *Pope & Talbot, Inc.*, 3 Cir., 206 F. (2d) 784, 795, it is said:

> "If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action. Where, on the other hand, the indemnitee and the indemnitor are co-defendants actively participating in the defense of the original action, or where the indemnitor, with notice of the action and of the indemnitee's request that he defend it, does not participate in the defense but leaves it to the reasonable efforts of the indemnitee, then in subsequent litigation between them both indemnitor and indemnitee are bound by the findings necessary to the judgment in the action."

To the foregoing general statement of law this court subscribes. While we are unable to determine how and why the result of a general verdict of a jury in *Harper* will impose liability upon Atlantic as a matter of law, we do not believe that Export has brought itself within the latter portion of the foregoing quoted language, even if we were to assume that the findings are binding upon Atlantic. Export's invitation to defend came less than one month prior to trial, approximately 21 months after the accident, 11 months after suit had been instituted by Harper, and many months after the trial date had been fixed at a pre-

trial conference attended by counsel for Harper and Export. Export's investigation and pleadings clearly indicated that Export was not liable for negligence and that the vessel was not unseaworthy. If we assume that Atlantic's investigation revealed only negligence of its winch operators, there would be no liability on Export and no maintainable action by Harper against Atlantic. Can it be said that in any action against a shipowner involving an injury to a longshoreman sustained during stevedoring operations, irrespective of merit, the stevedore is required to appear and defend in behalf of the shipowner, or otherwise suffer the consequences? We think not. The very purpose of the third-party action is to prevent needless multiplicity of litigation. *American Stevedores* v. *Porello*, 330 U.S. 446, 456; *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines, Ltd.*, supra. To permit Export to sit back, without filing a third-party complaint, and then reap the possible benefits of disputed litigation, but if unsuccessful look to the alleged indemnitor and contend that the indemnitor is financially obligated by the adverse results, would, in the opinion of this court, do violence to the spirit of third-party practice. It would permit a choice of forum by the alleged indemnitee in that he may then sue in admiralty to avoid the pitfalls of a jury verdict. The stevedore although admittedly held liable ultimately for many shipboard accidents to longshoremen, is not an insurer of the shipowner, either by way of defense or by way of indemnity.

The case of *Curtis* v. *L. Garcia Y Cia.*, 3 Cir., 241 F. (2d) 30, and the later action entitled *Curtis* v. *L. Garcia Y Cia.*, 3 Cir. 272 F. (2d) 235, contain an interesting discussion as to the legal effect of related proceedings. In 1952, six longshoremen were injured and one killed while engaged in discharging operations aboard Garcia's vessel which was

then being unloaded by Jarka, the stevedore. A third-party complaint was filed by Garcia against Jarka but was dismissed and subsequently reinstated. However, during the trial of the civil action filed by the longshoremen, Jarka was a party to the proceeding until the close of all the evidence when Jarka's motion to dismiss was granted. Hence there was no finding by the jury as to Jarka. The jury did conclude that Garcia's negligence was a contributing factor in bringing about the accident, but also found that there was no unseaworthiness on the part of the vessel which was a contributive factor. While expressing some doubt how, under the facts there presented, the jury could conclude that the cargo was stowed in a manner which did not create a dangerous condition, the court of appeals affirmed the verdict by reason of abundant evidence supporting the finding as to Garcia's negligence.

When Garcia's third-party complaint against Jarka was reinstated and the indemnity trial proceeded, another jury found that the method of unloading used by Jarka was negligent, but further found that this was a customary method of unloading at the port of Philadelphia. The jury further found that the negligence of the shipowner, Garcia, resulted from a failure of Jarka to perform its obligation to discharge cargo in a reasonably safe manner. Jarka, contending that the finding of Garcia's negligence at the first trial was binding, urged that the question was not open for re-litigation at the trial of the third-party claim. The court of appeals held that the failure of the jury in the first case to specify or clearly indicate what conduct of Garcia constituted negligence prevented the judgment in the first case from providing any proper basis that the issue of Garcia's negligence had become *res judicata*. On rehear

ing before the court *en banc* the original decision was adhered to, and the court said (272 F. (2d) 241):

> "While the original judgment on the principal claim, as affirmed, left the jury's finding of negligence of the original defendant [shipowner] as an authoritatively established fact for purposes of the retrial of the third-party claim, it would be unfair to go further and employ mere judicial comment on the evidence made on the original appeal in the absence of the third-party defendant as a pronouncement binding against the absentee."

Applying these principles to the instant case, the jury's finding as to Export's negligence and the unseaworthiness of the SS EXCELLER are final and binding in the trial of the indemnity action as the same may apply to Export. Assuming arguendo that there was no duty on the part of the Atlantic to come in and defend, Atlantic is entitled to separate findings, if supported by the evidence, as to the cause of the accident in which Harper was injured. To hold otherwise would completely refute the holding in *Atlantic & Gulf Stevedores* v. *Ellerman Lines, Ltd.*, supra. While the effect of this pronouncement leaves Export saddled with a judgment for an injury caused solely by stevedore negligence, it must not be overlooked that Export had ample time and means to bring Atlantic before the court as a third-party defendant and the rights and liabilities of all parties could then have been resolved under an appropriate charge together with the submission of special interrogatories.

To accept Export's contention that the findings by the jury in *Harper* are binding will result in a completely

inconsistent position. If the jury had specifically concluded that the vessel was unseaworthy, we must assume that such unseaworthiness existed in the winches. There was, of course, a contractual requirement on the part of Export to furnish Atlantic with winches in proper working condition. If Export breached its contract in this respect, and if such breach caused the accident to Harper, Export could not then recover by way of indemnity. Certainly Export, in a separately instituted indemnity action, would not expect to be bound by such a finding. By the same token, as Export has now selected a separate trier of fact, Atlantic is entitled to independent findings as to the cause of the accident.

We do not believe that the holding in this case is essentially in conflict with certain decisions of the Fourth Circuit[2] especially in light of the recent opinion of the Supreme Court in *Atlantic & Gulf Stevedores v. Ellerman Lines, Ltd.*, supra. Nor can we agree, in light of the foregoing decision, that the shipowner need only establish a potential liability to the injured longshoreman and some negligent conduct on the stevedore's part contributing to the longshoreman's injury to recover upon the theory of indemnity as stated in *California Stevedore & B. Co. v. Pan-Atlantic S.S. Corp.*, 9 Cir., 291 F. (2d) 252.

As this court arrives at a contrary conclusion from that of the jury in Harper's action and now finds that the sole contributing factor causing the accident was the negligence of the winch operators, and as the court further finds that,

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[2] *Farm Bureau Mutual Auto. Ins. Co. v. Hammock*, 4 Cir., 177 F. (2d) 793; *Revel v. American Export Lines, Inc.*, 162 F. Supp. 279, aff. 4 Cir., 266 F. (2d) 82; *Calmar SS Corp. v. Nacirema Operating Co.*, 4 Cir., 266 F. (2d) 79; *General Electric Co. v. Moretz*, 4 Cir., 270 F. (2d) 780.

under the facts of this case, Atlantic was not required to take over the defense of Harper's action, the libel will be dismissed. In the confusing field of law relating to indemnity actions by shipowners against stevedores, a more authoritative clarification of the rights of the respective parties would be gratifying.

Proctors for the respondent will prepare and present, after opportunity for inspection and endorsement, an appropriate decree. The court adopts this memorandum in lieu of specific findings of fact and conclusions of law.

(SGD) WALTER F. HOFFMAN
United States District Judge

Norfolk, Virginia
June 7, 1962

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8738.

American Export Lines, Inc., a foreign corporation,
Appellant,

versus

Atlantic & Gulf Stevedores, Inc., a corporation,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK.
WALTER E. HOFFMAN, DISTRICT JUDGE.

(Argued November 5, 1962. Decided January 9, 1963.)

Before SOBELOFF, Chief Judge, and SOPER and J. SPENCER BELL, Circuit Judges.

John W. Winston (Seawell, McCoy, Winston & Dalton on brief) for Appellant, and William B. Eley (Rixey & Rixey on brief) for Appellee.

SOBELOFF, Chief Judge:

Can a stevedore rely upon its own negligence as a defense to the action of a shipowner seeking indemnity for a money judgment paid out to a victim of the stevedore's carelessness? We hold that it cannot.

On September 26, 1956, during loading operations aboard the S.S. EXCELLER, owned by American Export Lines, a draft of freight struck the coaming of the No. 5 hatch. Its contents spilled into the hold, seriously injuring Arthur Harper, a longshoreman employed by Atlantic & Gulf Stevedores, who was working below. After collecting compensation from his employer under the Longshoremen's and Harbor Workers' Compensation Act, Harper brought an action against Export, alleging negligence and unseaworthiness. At the trial two versions were presented as to what caused the draft to strike the coaming. Some witnesses testified that the winches were defective, and that this condition was known to the stevedore personnel at least two and one-half hours before the accident, but the foreman of the gang of longshoremen

ordered them to proceed with their work. This testimony indicated that the accident resulted from the stevedore's negligence which activated a pre-existing defect in the winches. There was other testimony, however, that the accident was caused solely by the failure of the winch operators to raise the draft to a sufficient height, thus permitting it to strike the coaming instead of passing above it. On this conflicting evidence, a jury rendered a general verdict against the vessel's owner in favor of Harper in the sum of $25,000. Judgment was entered, which Export paid. With the addition of counsel fees and expenses, the total loss to Export amounted to $31,585.37.

Thereupon Export brought the present action for indemnity against the stevedore, Atlantic, which, although not a party to the original action,[1] had advance notice thereof and sent an attorney to observe the proceedings. In the indemnity action, tried on the admiralty side of the District Court, the Judge found on evidence virtually identical to that presented in the original action "that the sole proximate cause of the accident was the negligence of Harper's co-employees, Shell and Hardy, in the operation of the winches." Indeed, Atlantic insisted in the District Court and again on this appeal that the substandard performance of its own employees was the sole cause of Harper's accident. The District Court, instead of awarding judgment in favor of the innocent shipowner, absolved the stevedore whose admitted breach of warranty to perform services in a workmanlike manner occasioned Harper's

[1] Atlantic rejected the shipowner's offer to take over the defense of the litigation.

injury and Export's financial loss. The theory upon which recovery was denied was that, since Export was free from fault, the jury's finding of initial liability furnished no basis for imposing, in a separate action, a correlative obligation of indemnity upon Atlantic. *American Export Lines, Inc.* v. *Atlantic & Gulf Stevedores*, 205 F. Supp. 316 (E.D. Va. 1962). The anomalous result of this reasoning is that responsibility confers complete immunity.

Such a result stands in flat contradiction of the firmly established rule "that a stevedoring contractor who enters into a service agreement with a shipowner is liable to indemnify the owner for damages sustained as a result of the stevedore's breach of his warranty to perform the obligations of the contract with reasonably safety."[2]

A jury had determined Export's liability to Harper, and Export having paid the judgment, it was entitled to

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[2] *Waterman S.S. Co.* v. *Dugan & McNamara*, 364 U. S. 421, 423 (1960); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 429 (1959); *Weyerhaeuser S.S. Co.*, v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); *Ryan Co.* v. *Pan-Atlantic Corp.*, 350 U.S. 124, 130-34 (1955); *Moore-McCormack Lines, Inc.* v. *Maryland Ship Ceiling Co., Inc.*, F.2d (4th Cir. 1962); *Rederi A/B Dalen* v. *Maher*, 303 F.2d 565, 566 (4th Cir. 1962); *Smith* v. *Jugoslavenska Linijska Plovidba*, 278 F.2d 176, 180 (4th Cir. 1960); *Calmar S.S. Corp.* v. *Nacirema Operating Co.*, 266 F.2d 79, 80 (4th Cir. 1959); *American Export Lines, Inc.* v. *Revel*, 266 F.2d 82 (4th Cir. 1959).

[3] It has been held, even when the parties effect settlement without proceeding to judgment, that the initial liability is not subject to be relitigated in the indemnity action. *See Waterman S.S. Co.* v. *Dugan and McNamara*, 364 U.S. 421 (1960); *Rederi A/B Dalen* v. *Maher*, 303 F.2d 565, 566-67 (4th Cir. 1962); *Paliaga* v. *Luckenbach S.S. Co.*, 301 F.2d 403, 409-10 (2d Cir. 1962); *California Stevedore & Ballast Co.* v. *Pan-Atlantic S.S. Corp.*, 291 F.2d 252, 254 (9th Cir. 1961).

raise in a separate action the entirely distinct question whether the existing risk of injury as found by the jury was brought into play by the stevedore's failure to perform its contracted services with reasonable safety. *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Calmar S.S. Corp. v. Nacirema Operating Co.*, 266 F.2d 79 (4th Cir. 1959). There was no requirement that this question be raised in the original action by impleading the stevedore under Admiralty Rule 56. Impleader is permissible but not compulsory. Gilmore & Black, *The Law of Admiralty*, 365 (1957); 3 *Moore's Federal Practice*, § 14.06, citing *Erie R. Co. v. Erie & Western Transportation Co.*, 204 U.S. 220 (1907), and *Fyfe v. Pan-Atlantic S.S. Corp.*, 37 F. Supp. 497 (S.D.N.Y. 1941). The shipowner was bound only to show that the stevedore's breach of warranty occasioned its expense, *Rederi A/B Dalen v. Maher*, *supra* at 567, absent conduct on its own part sufficient to preclude recovery. *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 567 (1958). No such conduct is alleged or proved.

The District Court found upon abundant evidence, including that of the stevedore itself, that negligence of the winch operators was the sole proximate cause of the accident. What the stevedore here advances as a defense in reality supplies the very basis for its liability. The breach of the duty to use proper care is manifest. Reimbursement must follow.

Reversed, with directions to enter judgment for American Export Lines.

Reversed and remanded.

APPENDIX C

(3.) JUDGMENT BELOW

U. S. COURT OF APPEALS

[Caption Omitted]

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, with directions to enter judgment for the Appellant, American Export Lines, Inc., a foreign corporation, in accordance with the opinion of the Court filed herein. January 9, 1963.

SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.